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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE, Plaintiff and Respondent, v. NAJEE AKEEN A'VE, Defendant and Appellant.	C085876 (Super. Ct. No. CRF13-3110)

Following a court trial, defendant Najee Akeen A've was found guilty of rape of an unconscious person (Pen. Code, § 261, subd. (a)(4))[1] and sexual penetration of the genital or anal opening of a person under 18 years of age by a foreign object (§ 289, subd. (h)). He was found not guilty of assault of a person under 18 years of age with the intent to commit a sex crime (e.g., rape) (§ 220, subd. (a)(2)). The trial court sentenced him to

[1] Undesignated statutory references are to the Penal Code.

an aggregate term of three years eight months in state prison, consisting of three years for the rape offense plus a consecutive eight months for the sexual penetration offense.

At trial, defendant did not dispute that he had sexual intercourse with an unconscious 17-year-old girl and placed his finger inside her vagina and anus. Instead, his theory was that acquittal was justified because he was unconscious at the time he acted. According to defendant, he was experiencing an episode of sexsomnia, which is a distinct form of a parasomnia sleep disorder, characterized by a person engaging in sexual acts while asleep.

On appeal, defendant contends reversal is required because (1) there was insufficient evidence for the trial court to conclude that his unconsciousness was caused by voluntary intoxication rather than an episode of parasomnia, (2) the trial court erroneously concluded that the sexual penetration offense is a general intent crime, (3) the trial court abused its discretion in denying his request for probation, and (4) he did not knowingly and intelligently waive his right to a jury trial. We will reverse the sexual penetration conviction and otherwise affirm the judgment.

FACTUAL BACKGROUND

We provide a summary of only the facts pertinent to this appeal. Additional information relevant to defendant's claims is discussed *post*.

Victim's Testimony

The victim, I.S., was 17 years old when she graduated high school in 2013. She lived in Loomis.

In the summer after she graduated, I.S. interned at UC Davis under the supervision of a family friend, Tomas Rodriguez. During the week (Monday through Thursday), she stayed with Rodriguez at his two-story apartment in Davis. She slept in his upstairs bedroom or downstairs on the large L-shaped couch.

Defendant was Rodriguez's roommate. His bedroom was upstairs. He knew I.S. was 17 years old.

On August 1, 2013, the night before her internship ended, I.S. went to a party with Rodriguez and his girlfriend around 10:00 p.m. Sometime between 1:00 and 2:00 a.m., they left the party and went to Rodriguez's apartment. I.S. drank two shots of alcohol at the party but was sober when she left.

Defendant, who was also at the party, did not leave when I.S. and the others left. I.S. did not interact with defendant at the party and did not know if he had consumed any alcohol.

Because Rodriguez's girlfriend was staying the night, I.S. decided to sleep on the couch. She fell asleep around 2:30 a.m.; she used a thin blanket to cover herself and was wearing a T-shirt and shorts because it was really hot. At some point after she fell asleep, I.S. heard defendant ask her to move down the couch. She complied with his request and then fell back asleep. The next thing she remembered was defendant whispering in her ear, "Can you feel it?" When she failed to respond, he said, "Come on, can you feel it?" Although not fully awake, I.S. realized that defendant had placed his penis inside her vagina. At that moment, I.S. was in shock and really scared. She could not move and "kind of just froze." Defendant then said, "Come on, come on, can you feel it" at least one more time "as if he "needed [her] to respond or react, like he was waiting for [her] to say something back." I.S. did not say anything to defendant and did not smell alcohol on his breath.

I.S. testified that it felt like defendant had intercourse with her for "a really long time." However, she noted that it could have lasted only a few minutes. When he stopped, she moved away from him. He then began to make noises that sounded like he was masturbating. As defendant was making these noises, he grabbed I.S.'s "vagina area." He also put his finger inside her vagina and anus. I.S. pushed his hand away and

kicked her legs to make him stop. Thereafter, she heard him make noises like he was masturbating. When he stopped making noise, she ran into Rodriguez's room, closed the door, and started crying. After Rodriguez and his girlfriend woke up, I.S. told them what had happened and they decided to leave the apartment. Defendant was asleep on the couch when they left.

Later that day, I.S. went to the Davis Police Department.

Defendant's Testimony

Defendant testified on his own behalf at trial, which commenced on March 30, 2017. He testified that on August 1, 2013, he went to two summer school classes at Sacramento City College in the morning, practiced football at Sacramento City College, and then went to a class at UC Davis at 7:00 p.m.[2] He arrived home around 8:30 p.m. Thereafter, he went with I.S. and Rodriguez to I.S.'s sister's apartment in Sacramento. Over the next 30 minutes he drank two shots of alcohol. Rodriguez then drove defendant and I.S. back to Davis. They picked up Rodriguez's girlfriend and her friend and then went to a party in Davis.

Defendant drank five shots of alcohol at the party. According to defendant, he was "probably at the high point of [his] buzz" when he left the party but was "[n]ot to the point where [he was] falling out but . . . definitely talkative." He noted that one of the people at the party said he was "fucked up."

When defendant arrived home, I.S. was asleep on the couch. Because it was hot in his upstairs bedroom, he decided to sleep on the couch. Before he fell asleep, he asked I.S. to move over. He did not take his pants or shirt off. According to defendant, he has no memory of what happened after he fell asleep.

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2 In the summer of 2013, defendant took four summer school classes.

Rodriguez woke defendant up around 11:00 a.m. the next morning. He was horrified when he was told that I.S. had accused him of raping her.[3]

Pretext Telephone Call

Sometime after 4:00 p.m. that same day, Rodriguez placed a pretext telephone call to defendant at the request of law enforcement. The call was recorded and played at trial. It took place after defendant had just finished a final exam.

During the call, defendant claimed that he fell asleep on the couch after telling I.S. to move over and had no memory of anything that happened after that. He explained that he "knocked out" and the next thing he remembered was Rodriguez waking him up. He denied having an interest in I.S. and claimed he did not know if he had raped her. He reasoned that it did not seem plausible because his pants were on when he woke up and the buttons were really hard to fasten.

When asked if he could have been drunk enough to rape I.S., defendant said he did not want to "think about that." He admitted that he was "fucked up" but claimed he "wasn't falling over drunk" or "shit-faced drunk." However, he acknowledged that he "wasn't like [his] normal self" and noted that a person at the party said he was "fucked up." When asked if he remembered what had happened, he said, "Dude, I don't remember shit after I'm drunk." However, he remembered the TV show that was on when he came home and that he had asked I.S. to move over. He explained, "[A]fter that, I just like—I was gone." He added, "I was like knocked out—but I'm pretty sure I was asleep."

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3 When Rodriguez testified, he said that defendant was "very, very surprised" and "shocked" when he learned that I.S. had accused him of raping her. Rodriguez said it took defendant "a little bit to take it all in."

When asked if he thought he had raped I.S., he claimed that it was not in his nature to rape a woman, and that he "couldn't" and "wouldn't" have done that. He explained, "I'm not that kind of guy that'll press the issue normally. I can't, I don't. I couldn't see myself doing that." However, he acknowledged that he acts silly when he is drunk and does stupid shit he would not normally do. He explained that the last time he was drunk, he was "[f]ucken laid up in a fucken closet, fucken talking in a funked-up accent and shit." He further explained that the first time he got drunk he took off his shirt, did push-ups, and accidentally "hit a bitch in the head." He claimed that he had been drunk only four times in his life and that he had never done anything sexual with a girl when he was drunk.

DISCUSSION

1.0 Substantial Evidence

"When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] . . . We presume in support of the judgment the existence of every fact the trier of fact reasonably could infer from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] A reviewing court neither reweighs evidence nor reevaluates a witness's credibility." (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.)

1.1 *Additional Background*

The defense theory was that acquittal was justified because defendant was unconscious when he acted as a result of an episode of parasomnia.

When defendant was interviewed by a police officer following the incident with I.S., he explained that he is a very deep sleeper and does not usually remember things that occur after he falls asleep, e.g., waking up and going to the bathroom. He further stated, "But other than that, I don't have a history of sleepwalking."

At trial, defendant testified that he was aware of only one sleepwalking incident that occurred prior to the night he had sexual intercourse with I.S. He recalled that his mother had told him that when he was around six years old he got out of bed, walked past her and down the stairs, and then sat at the bottom of the stairs. Defendant also testified that he had participated in a sleep study after the incident with I.S. and was told he has narcolepsy. He did not claim that he had ever experienced another episode of sexsomnia, either before or after the incident with I.S. He explained that the first time he got drunk was in April 2013, four months prior to this incident, and admitted that he acts out of character when he is drunk.

Defendant's current girlfriend, who had been in a relationship with him since November 2013, testified that he had "received" medication for a sleeping disorder and that there were times when she suspected he was sleepwalking. She explained that he would get up after falling asleep and get a drink of water or food. She also recalled an incident where he took the dog outside to go to the bathroom and an incident where he went into the corner of the bedroom and looked like he was trying to urinate. She did not claim that defendant had ever engaged or tried to engage in a sexual act with her after he had fallen asleep.

Abraham Ishaaya, M.D., testified for the defense as an expert in sleep medicine, including parasomnias. He described a parasomnia as "something that occurs while you sleep. . . . [I]t [is] a complex act that is fairly uninhibited. In other words, [people] don't have a whole lot of control over it. It usually occurs during . . . the transition stage, and it occurs during the non-rem, non-dream state. [People] usually do one of many complex

acts; things to the effect of sleepwalking, sleep eating, sleep driving, and . . . any type of violent act. [¶] So basically, it's a complex act, but in essence, uninhibited, almost separating the reasoning part of the act from the animal part of the act, if you will." Dr. Ishaaya described sexsomnia as "performing any type of sexual act while you're asleep. In essence, it's also a parasomnia that occurs while you're asleep. And once again, [people] are unaware of the act, but it does occur, and it is a complex act and it is very well known in the . . . sleep literature."

Dr. Ishaaya explained that some of the common things that cause or contribute to an episode of parasomnia include sedatives (such as alcohol), hypnotics, tranquilizers, stimulants, sleep deprivation, any type of interruption during sleep, psychiatric instability, and significant social stressors. He noted that he had reviewed defendant's medical records, which he characterized as including findings from a sleep and nap study that were consistent with narcolepsy. Dr. Ishaaya explained that narcolepsy is "one of the sleepiest disorders. . . . So adding [that] on top of . . . stressors, alcohol, [and] sleep deprivation, can certainly lead to a parasomnia."

When given the following hypothetical, he described it as the "perfect storm" to induce parasomnia: A 20-year-old person with narcolepsy and a poor diet who consumed alcohol during college finals after participating in a football practice.[4] He opined that these factors could reasonably induce an episode of parasomnia (including sexsomnia), even in a person with no history of parasomnia. He explained, "[W]hen you look at all the coexistent factors that [were] described, including being sleep deprived, having exceptional stressors and having alcohol . . . and adding the factor of having narcolepsy, potentially may [create the storm that leads to] a sleepwalking episode." He noted that a person who suffered an episode of parasomnia would not have any recollection of the

[4] Defendant was 20 years old in August 2013.

event unless they were adequately awakened during the act. By contrast, he stated that the overwhelming majority of people who drink to excess will remember that they engaged in an embarrassing act, including sexual activity. He explained that the person might be unable to recall all the details of the act but he or she would be able to remember the components of the act.

According to Dr. Ishaaya, the type of sexual assault described by I.S. was inconsistent with the act being committed by an inexperienced drinker who had consumed seven shots of alcohol and had an alcohol "blackout" and a "complex sexual act." He said that a person who drank to excess would not be able to accomplish those types of complex acts; "They would fumble. They would make mistakes. They would not be able to accomplish a complex act like that." Dr. Ishaaya also said that an inexperienced drinker who drank to the point where he blacked out would not be feeling well enough to take a final exam the following day.

Based on I.S.'s description of the incident and defendant's lack of memory of what had happened after he fell asleep, Dr. Ishaaya concluded that the "overwhelming likelihood is that [defendant] had a parasomnia [event]." In so concluding, Dr. Ishaaya noted that "most [people] who do an unusual act who may not recall it or do something that's uninhibited, it's usually occurring while they're drinking. It doesn't occur after they go to sleep."

During closing argument, the prosecutor argued that voluntary intoxication was not a defense to the rape and sexual penetration offenses because those offenses are general intent crimes. The prosecutor further argued that, even if Dr. Ishaaya's opinion was credited, unconsciousness was not a defense to these crimes because the purported unconsciousness (i.e., episode of parasomnia) was brought on by voluntary intoxication. In her concluding remarks, the prosecutor stated, "There are two ways in this case that you can believe the facts come down: The defendant got drunk and acted even knowing

that he would act inappropriately and decided to sleep on the same couch that was already occupied by a 17 year old and thereafter raped her while she slept, or the defendant got drunk which created a perfect storm because he drove himself to the edge of the storm by getting so intoxicated and even knowing that he acts inappropriately when he does this, he decided to sleep on the same couch which was then already occupied by a 17-year-old girl and raped her while she slept. [¶] Either way, his actions were brought on by his decisions, his drinking, and the only victim here is . . . [I.S.]."

In response, defense counsel did not dispute that defendant had sexual intercourse with I.S. or used his finger to penetrate her vagina and anus. Instead, he argued that defendant should be acquitted of the charged crimes because he was experiencing an episode of parasomnia, that is, he was not guilty because he acted while unconscious. In making this argument, counsel noted that the uncontroverted evidence showed that defendant had a sleep disorder—narcolepsy. Counsel further noted that Dr. Ishaaya's opinion about defendant's experiencing an episode of parasomnia was supported by the evidence and uncontroverted, and that the evidence showed defendant's conduct was inconsistent with being "blackout drunk." Counsel maintained that a finding of not guilty was justified because the evidence showed there was more than a reasonable doubt defendant was experiencing an episode of parasomnia and was not conscious of his actions.

In her final closing argument, the prosecutor reiterated that the defense of unconsciousness may not be based on voluntary intoxication for general intent crimes. She argued that defendant had failed to show that he was legally unconscious when he acted because legal unconsciousness cannot be based on voluntary intoxication. The prosecutor stated, "[A]ny defense predicated on a parasomnia rests on the back of a night of complete alcohol indulgence, and the law just does not and will not allow that as a justification for any general intent crime." The prosecutor further stated, "If we look at

the excuses for defendant's behavior, it comes back down to the primary focus: Was he legally unconscious? Any kind of unconsciousness in this case is based on his alcohol consumption which the law says is not a legal basis, and, therefore, . . . the defendant is guilty." When asked if she had any comments about the sexual assault charge, the prosecutor told the trial court, "It is a specific intent crime. I believe [the People] have met all the elements. If the court does believe he drank to the point where he was unconscious, then the . . . voluntary intoxication can be a defense for the specific intent, which is the final . . . element where it is required that he do so with intent, the specific intent for sexual arousal."

The trial court found defendant guilty of the rape and sexual penetration offenses but not guilty of the sexual assault offense. In so finding, the court reasoned as follows: "In evaluating this matter, I considered the testimony of Dr. Ishaaya, and I found his opinion to be either unsupported by the evidence or not entitled to a great deal of weight based upon the evidence as I heard it. For example, he testified that there was a perfect storm, and yet, in my opinion, the evidence didn't support basing that on that the defendant was sleep-deprived or that the defendant was subject to exceptional stressors, and, frankly, the evidence that the defendant had narcolepsy is not clear from the medical records. Although there's some opinion that he may have that, in my mind it wasn't as firmly established as Dr. Ishaaya opined.

"I would also note that Dr. Ishaaya's opinion about loss of memory due to excessive drinking, there was much questioning about blackouts and this defendant, and his opinion was contrary to other evidence about the history of loss of memory due to heavy drinking that this defendant experienced. Those things prompted me to put marginal weight in his opinion.

"The court agrees with the People that voluntary intoxication is not a defense to a general intent crime as charged in counts 1 and 3, and there is ample evidence that the

defendant's state was largely due to voluntary intoxication, heavy intoxication. The court finds beyond a reasonable doubt that count 1, a violation of Penal Code section 261[, subdivision] (a)(4), rape of an unconscious person, had been proven and, therefore, the court finds the defendant guilty of that charge.

"The court finds reasonable doubt as to count 2. Therefore, the court finds the defendant not guilty of count 2, Penal Code section 220[, subdivision] (a)(2), assault with intent to commit a sex crime on a minor.

"The court finds beyond a reasonable doubt that guilt has been proven as to count 3, a violation of Penal Code section 289[, subdivision] (h), penetration of genital or anal opening of a person under 18 years of age by a foreign object. Therefore, the court finds him guilty of that charge."

1.2 *Analysis*

Defendant contends the judgment must be reversed because there was insufficient evidence to support the trial court's conclusion that his unconsciousness was caused by voluntary intoxication rather than an episode of parasomnia. Defendant asserts that the trial court's "split verdict" was due to its erroneous finding that his "unconscious parasomnia" was due to voluntary intoxication. According to defendant, this finding is not supported by the record because he presented evidence sufficient to raise a reasonable doubt that he was unconscious, and there was insufficient evidence to support a finding that his unconsciousness was caused by voluntary intoxication. Defendant maintains that the evidence shows that his alcohol consumption was one of several factors contributing to an episode of parasomnia and does not show he was heavily intoxicated. In addition, defendant contends reversal is required because the trial court erred in finding that the sexual penetration offense is a general intent crime. We conclude there was substantial evidence to support defendant's rape conviction but that reversal is required on the sexual

penetration offense because the trial court erroneously concluded that the offense is a general intent crime.

There is a presumption that a person who appears to act in an apparent state of consciousness is conscious. (*People v. Hardy* (1948) 33 Cal.2d 52, 63-64.) Therefore, the burden is on a criminal defendant to produce evidence rebutting this presumption of consciousness. (*People v. Cruz* (1978) 83 Cal.App.3d 308, 331; see *People v. Froom* (1980) 108 Cal.App.3d 820, 830.)

"A person 'who commit[s] the act charged without being conscious thereof' is deemed incapable of committing a crime." (*People v. Gana* (2015) 236 Cal.App.4th 598, 609.) "Unconsciousness, if not induced by voluntary intoxication, is a complete defense to a criminal charge. [Citations.] To constitute a defense, unconsciousness need not rise to the level of coma or inability to walk or perform manual movements; it can exist 'where the subject physically acts but is not, at the time, conscious of acting.' " (*People v. Halvorsen* (2007) 42 Cal.4th 379, 417.) "An unconscious act, as defined 'within the contemplation of the Penal Code is one committed by a person who because of somnambulism, a blow on the head, or similar cause is not conscious of acting and whose act therefore cannot be deemed volitional.' " (*People v. Ferguson* (2011) 194 Cal.App.4th 1070, 1083.)

" ' "If the state of unconsciousness is caused by voluntary intoxication, . . . it is not a complete defense." [Citation.]' [Citations.] It can negate specific intent, but is no defense to a general intent crime. [Citation.] '[C]riminal responsibility in a general intent crime is justified where a defendant is voluntarily intoxicated to the point of unconsciousness even though there was no actual intent to commit a crime because a defendant may not avoid the criminal harm caused by his or her failure to act "with reason and conscience." ' [Citations.] [¶] Therefore, if the evidence raises a reasonable doubt that the defendant was conscious at the time of the alleged criminal conduct,

unconsciousness is a complete defense to both general and specific intent crimes. However, if the [trier of fact] finds the unconsciousness was the result of voluntary intoxication, then unconsciousness is a defense only to specific intent crimes." (*People v. James* (2015) 238 Cal.App.4th 794, 805.)

Rape is a general intent crime that merely requires the intent to do the prohibited act. (*People v. DePriest* (2007) 42 Cal.4th 1, 48.) The mental state requirement for rape of an unconscious person is only that the perpetrator knows the victim is unconscious and has the intent to have sexual intercourse with that person. "Hence, a person who intentionally has sexual intercourse with an unconscious victim knowing that the victim is unconscious commits rape of an unconscious person." (*People v. Dancy* (2002) 102 Cal.App.4th 21, 34.)

The crime of sexual penetration by a foreign object is a specific intent crime because it requires the penetration "to be done with the intent to gain sexual arousal or gratification or to inflict abuse on the victim . . . ." (*People v. McCoy* (2013) 215 Cal.App.4th 1510, 1541; accord, *People v. ZarateCastillo* (2016) 244 Cal.App.4th 1161, 1167-1169; *People v. Ngo* (2014) 225 Cal.App.4th 126, 157 [§ 288.7, sexual penetration with a child, is a specific intent crime]; *People v. Senior* (1992) 3 Cal.App.4th 765, 776 ["specific intent involved in foreign object penetration is 'the purpose of sexual arousal, gratification, or abuse' "].)

Evidence of a defendant's voluntary intoxication that does not render him unconscious is admissible to negate a required specific intent but is inadmissible to negate general criminal intent. (*People v. Moore* (2018) 19 Cal.App.5th 889, 893-894; § 29.4.) Thus, evidence of voluntary intoxication is not a defense to rape but could be used to negate the mental state required to be convicted of sexual penetration by a foreign object. (See *People v. Braslaw* (2015) 233 Cal.App.4th 1239, 1250-1251.)

Viewing the evidence in the light most favorable to the judgment, we conclude that substantial evidence supports defendant's rape conviction. The uncontroverted evidence at trial showed that defendant had sexual intercourse with I.S. while she was asleep. Defendant did not dispute that he engaged in such conduct. Instead, he argued that acquittal was justified because he was unconscious at the time he acted. According to defendant, he was experiencing an episode of parasomnia. In support of his theory, defendant largely relied on the expert testimony of Dr. Ishaaya. Before the trial court rendered its verdict, it detailed the reasons that "prompted [it] to put marginal weight" in Dr. Ishaaya's opinion that the "overwhelming likelihood" was that defendant experienced an episode of parasomnia. The record reflects that the trial court considered and rejected Dr. Ishaaya's opinion because the court was not persuaded by the reasons upon which the opinion rested. The court found that defendant's mental state at the time of the crimes "was largely due to voluntary intoxication, heavy intoxication." This finding is supported by substantial evidence. The trial court did not, as defendant claims, specifically find that he was unconscious as a result of voluntary intoxication. But even assuming the court made such a finding, unconsciousness caused by voluntary intoxication is not is a defense to a general intent crime such as rape. (*People v. James*, *supra*, 238 Cal.App.4th at p. 805.)

Contrary to defendant's suggestion, the trial court was not required to accept Dr. Ishaaya's opinion. (CALCRIM No. 332; see generally *In re Scott* (2003) 29 Cal.4th 783, 823 ["Although experts may testify about their opinions, the fact finder decides what weight to give those opinions."]; *In re Brian J.* (2007) 150 Cal.App.4th 97, 115 [trier of fact not bound by any expert's opinion]; *Jonathon v. Shea* (1971) 19 Cal.App.3d 328, 334 ["expert testimony, even if uncontradicted, is circumstantial rather than direct evidence, and it is not binding upon the court"].) The court was free to give Dr. Ishaaya's opinion the weight it felt the opinion deserved and to disregard the opinion if it concluded the

opinion was unbelievable, unreasonable, or unsupported by the evidence. (CALCRIM No. 332; see *People v. Johnson* (1992) 3 Cal.4th 1183, 1231-1232.)

To the extent defendant argues that reversal is required because he presented evidence raising a reasonable doubt that he was conscious as a result of an episode of parasomnia, he misconstrues and/or misapplies the substantial evidence standard of review. None of the evidence cited by defendant shows there is insufficient evidence to support the trial court's guilty verdict on the rape charge. When a defendant challenges a conviction for insufficiency of evidence, we must presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence and do not reweigh the evidence. (*People v. Lindberg*, *supra*, 45 Cal.4th at p. 27.) On this record, substantial evidence supports the trial court's guilty verdict. There is sufficient evidence in the record to support the trial court's finding as to defendant's mental state when he raped I.S. Accordingly, we reject defendant's contention that reversal of his rape conviction is warranted.

We agree, however, with defendant that reversal of his sexual penetration conviction is required. "[A] trial court's remarks in a bench trial cannot be used to show that the trial court misapplied the law or erred in its reasoning [unless] . . . [¶] . . . *taken as a whole*, the judge's statement discloses an incorrect rather than a correct concept of the relevant law, 'embodied not merely in "secondary remarks" but in [the judge's] basic ruling.' " (*People v. Tessman* (2014) 223 Cal.App.4th 1293, 1302.) The court's comments must "unambiguously disclose that its basic ruling embodied or was based on a misunderstanding of the relevant law." (*In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1440; see *Tessman*, *supra*, at p. 1303 [trial court's statements must unambiguously disclose that, in his or her ruling, the trial judge applied an erroneous interpretation of the law].)

Here, the prosecutor incorrectly argued in closing argument that the sexual penetration offense is a general intent crime. In the course of rendering its verdict, the trial court expressly agreed with the prosecutor. The court went on to find defendant guilty of the two offenses it believed were general intent crimes (i.e., the rape and sexual penetration offenses) while finding defendant not guilty on the crime requiring specific intent (i.e., the sexual assault offense). The court's remarks at sentencing plainly and unambiguously show that its guilty verdict on the sexual penetration offense was based on an erroneous understanding of the law. Nothing in the record suggests the court found that defendant had the requisite specific intent to be convicted of the sexual penetration offense. Accordingly, we will reverse defendant's sexual penetration conviction (count 3).

2.0 Denial of Probation

Defendant contends the trial court abused its discretion in denying his request for probation because it made an unsupported finding that alcohol played a large role in the commission of the crimes. We disagree.

The trial court has discretion to make numerous sentencing choices, including whether to grant or deny probation. In making these choices, the trial court need only state its reasons in simple language, identifying the primary factor or factors that support the exercise of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 850-851; California Rules of Court, rule 4.406(a).)[5] When we review a trial court's decision to deny probation, we may not substitute our judgment for that of the trial court. Our function is to determine whether the trial court's order denying probation is arbitrary or capricious or exceeds the bounds of reason considering all the facts and circumstances.

[5] Further rule references are to the California Rules of Court.

(*People v. Weaver* (2007) 149 Cal.App.4th 1301, 1311 (*Weaver*).) A defendant bears a " 'heavy burden' " when attempting to show an abuse of discretion. (*Ibid*.)

Rule 4.414 sets forth certain criteria relevant to the trial court's decision to grant or deny probation. The court may consider facts relating to the crime, including the nature, seriousness, and circumstances of the crime as compared to other instances of the same crime (rule 4.414(a)(1)), the vulnerability of the victim (rule 4.414(a)(3)), whether the defendant inflicted physical or emotional injury (rule 4.414(a)(4)), and whether the defendant was an active or a passive participant in the crime (rule 4.414(a)(6)). The court may also consider facts relating to the defendant, including his prior record of criminal conduct. (Rule 4.414(b)(1).) "In deciding whether to grant or deny probation, a trial court may also consider additional criteria not listed in the rules provided those criteria are reasonably related to that decision. [Citation.] A trial court is generally required to state its reasons for denying probation and imposing a prison sentence, including any additional reasons considered pursuant to rule 4.408.[6] [Citations.] Unless the record affirmatively shows otherwise, a trial court is deemed to have considered all relevant criteria in deciding whether to grant or deny probation or in making any other discretionary sentencing choice. [Citation.] [¶] . . . [I]n determining whether a trial court abused its discretion by denying probation, we consider, in part, whether there is sufficient, or substantial, evidence to support the court's finding that a particular factor was applicable." (*Weaver*, *supra*, 149 Cal.App.4th at p. 1313.)

At the outset of the sentencing hearing, the trial court noted that it had read and considered the report prepared by the probation department, which concluded that

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6 Rule 4.408(a) provides: "The listing of factors in these rules for making discretionary sentencing decisions is not exhaustive and does not prohibit a trial judge from using additional criteria reasonably related to the decision being made. Any such additional criteria must be stated on the record by the sentencing judge."

defendant was not suitable for probation and recommended the low term of three years on the rape offense, plus a consecutive eight months on the sexual penetration offense. Following a reading of I.S.'s victim impact statement, the prosecutor requested the sentence recommended by the probation department. Defense counsel acknowledged that the offenses committed by defendant were serious but requested probation, with at most a full year in county jail and a suspended prison commitment. In support of his request, counsel argued that the circumstances of defendant's criminal conduct were highly unusual and unlikely to occur again. He also argued that defendant was a college student when he committed the offenses, had no criminal record, and was sincerely remorseful. Defense counsel alternatively requested a concurrent sentence on the sexual penetration offense if the court was inclined to impose a three-year term on the rape offense. Thereafter, defendant's uncle made a statement about defendant's character. He said that, at the time of the crimes, defendant was a hardworking student who had a future and wanted to be an attorney.

In denying defendant's request for probation, the trial court reasoned as follows: "The probation department went through the criteria under [rule 4.414]. I agree that the nature and circumstances are neither more or less serious compared to other instances of the same crime. [¶] The victim was vulnerable. From hearing the victim's statement, the degree of emotional injury to the victim was substantial. The defendant was an active participant. I also acknowledge that the defendant has no prior criminal record. [¶] Following the discussion of those factors [i.e., the criteria set forth in rule 4.414], the probation department reported similar to what the defendant testified to, is that he blacks out when he drinks to excess, and that alcohol played a factor in this event and that the defendant has continued to drink despite these factors. [¶] The court agrees with probation that the defendant is not a suitable candidate for probation. Therefore, the court declines to grant him probation."

We find no abuse of discretion. The record reflects that the trial court considered the relevant factors and stated valid reasons for denying defendant's request for probation. Contrary to defendant's contention, the trial court did not make an unsupported finding that alcohol played a "large role" in the commission of the crimes. In denying defendant's request for probation, the court simply noted that "alcohol played a factor" in the crimes, and that defendant continued to drink after the crimes, despite the fact that he "blacks out when he drinks to excess." Defendant admitted as much to the probation officer. Moreover, there is ample evidence in the record to support the trial court's finding that alcohol played a role in defendant's crimes, including defendant's testimony. In addition, defendant's girlfriend testified that he had drank to "excess" after the crimes, meaning that there were times when he was "[s]tumbling, falling down drunk." Under the circumstances, we cannot conclude that defendant has met his heavy burden to show that the trial court's sentencing decision was arbitrary or capricious or exceeded the bounds of reason.

3.0 Waiver of a Jury Trial

Defendant contends that reversal is required because he did not knowingly and intelligently waive his right to a jury trial. We disagree.

3.1 *Additional Background*

At the trial readiness conference, the trial court noted that a jury trial was scheduled to begin the following week and that it understood the parties were willing to waive their right to a jury trial and proceed instead by court trial. Both the prosecutor and defense counsel indicated that the court's understanding was correct. The attorney appearing for defendant (i.e., stand-in counsel) stated, "I spoke with Mr. Muller [i.e., defendant's appointed counsel] and also [defendant], and they both so indicated." The following exchange then occurred:

"THE COURT: [Defendant], have you talked to Mr. Muller about waiving a jury trial in this case and doing it as a court trial instead?

"THE DEFENDANT: Yes.

"THE COURT: Okay. And you understand you have an absolute constitutional right to present your case to a jury. Do you understand that, sir?

"THE DEFENDANT: Yes.

"THE COURT: And do you waive that right, sir?

"THE DEFENDANT: Yes.

"THE COURT: Do the People also waive their right to a trial by jury in this matter?

"[THE PROSECUTOR]: Yes. Contingent on the position by both sides that this is with Judge Reed.

"THE COURT: So noted. I will find that both sides have made a knowing and intelligent and voluntary waiver of their right to trial by jury."

3.2 *Analysis*

A criminal defendant has the constitutional right to a jury trial. (*People v. Sivongxxay* (2017) 3 Cal.5th 151, 166 (*Sivongxxay*); see U.S. Const., amend. VI; Cal. Const., art. I, § 16.) The essence of the right to a jury trial is the right to be tried by a jury drawn from members of the community. "The purpose of the jury trial . . . is to prevent oppression by the Government. 'Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.' [Citation.] Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the

community participation and shared responsibility that results from that group's determination of guilt or innocence." (*Williams v. Florida* (1970) 399 U.S. 78, 100, quoting *Duncan v. Louisiana* (1968) 391 U.S. 145, 156.) Conversely, the primary consequence of waiving the right to a jury trial is that the defendant "no longer has the buffer of the judgment of his fellow citizens between him and the imposition of punishment by the state, but instead his fate is in the hands of a state official." (*U.S. ex rel. Williams v. DeRobertis* (7th Cir. 1983) 715 F.2d 1174, 1178.)

The defendant may waive his constitutional right to a jury trial, provided the waiver is " 'knowing and intelligent, that is, " ' "made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it," ' " as well as voluntary " ' "in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." ' " ' [Citations.] '[W]hether or not there is an intelligent, competent, self-protecting waiver of jury trial by an accused must depend upon the unique circumstances of each case.' " (*Sivongxxay*, *supra*, 3 Cal.5th at p. 166.)

Defendant does not argue that his purported waiver was involuntary. Rather, he contends that his decision to waive his right to a jury trial was not knowing and intelligent because he was not made aware of the nature of the right or the consequences of waiving it. Specifically, he asserts that the trial court erred by failing to inform him that 12 people are on a jury and all 12 people had to be convinced beyond a reasonable doubt that he was guilty in order to convict him.

We are not persuaded that the trial court's failure to advise defendant of the specific aspects of a jury trial requires reversal. Our Supreme Court has "persistently declined to mandate any specific admonitions describing aspects of the jury trial right." (*People v. Daniels* (2017) 3 Cal.5th 961, 992 (lead opn. of Cuéllar, J); see *Sivongxxay*, *supra*, 3 Cal.5th at p. 167 ["Our precedent has not mandated any specific method for

determining whether a defendant has made a knowing and intelligent waiver of a jury trial in favor of a bench trial."].) While *Sivongxxay* did provide "general guidance" for trial courts "[g]oing forward" (*Sivongxxay*, at p. 169),[7] the court was careful to "emphasize" that this "guidance is not intended to limit trial courts to a narrow or rigid colloquy" and observed, "[u]ltimately, a court must consider the defendant's individual circumstances and exercise judgment in deciding how best to ensure that a particular defendant who purports to waive a jury trial does so knowingly and intelligently." (*Id*. at p. 170.) The test of a valid waiver turns not on whether specific warnings or advisements were given, but on whether the record affirmatively shows that the waiver is voluntary and intelligent under the totality of the circumstances. (*Id*. at pp. 166-167.)

Here, we conclude that defendant entered a knowing and intelligent jury trial waiver under the totality of the circumstances. The record discloses that defendant was aware of his constitutional right to a jury trial and discussed waiving that right with counsel. At the time he entered the waiver, defendant had completed two years of

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[7] In *Sivongxxay*, which issued four months after defendant waived his jury trial right, our Supreme Court stated: "Going forward, we recommend that trial courts advise a defendant of the basic mechanics of a jury trial in a waiver colloquy, including but not necessarily limited to the facts that (1) a jury is made up of 12 members of the community; (2) a defendant through his or her counsel may participate in jury selection; (3) all 12 jurors must unanimously agree in order to render a verdict; and (4) if a defendant waives the right to a jury trial, a judge alone will decide his or her guilt or innocence. We also recommend that the trial judge take additional steps as appropriate to ensure, on the record, that the defendant comprehends what the jury trial right entails. A trial judge may do so in any number of ways—among them, by asking whether the defendant had an adequate opportunity to discuss the decision with his or her attorney, by asking whether counsel explained to the defendant the fundamental differences between a jury trial and a bench trial, or by asking the defendant directly if he or she understands or has any questions about the right being waived. Ultimately, a court must consider the defendant's individual circumstances and exercise judgment in deciding how best to ensure that a particular defendant who purports to waive a jury trial does so knowingly and intelligently." (*Sivongxxay*, *supra*, 3 Cal.5th at pp. 169-170.)

college[8] and was represented by counsel. He expressed no uncertainty about his jury trial right. Instead, he waived the right without hesitation. Because defendant's waiver was contingent upon the bench trial occurring before a specific judge, we can reasonably infer that the waiver was a tactical decision made by defendant after consultation with his counsel about the differences between a jury trial and a bench trial. Indeed, given the defense theory, defendant and his counsel had a valid tactical reason for waiving a jury trial in this case.

Although the trial court did not explain to defendant the basic mechanics of a jury trial or the differences between a bench trial and jury trial, a court is not obligated to advise a defendant represented by counsel about " 'all the ins and outs' " of a jury trial (*People v. Wrest* (1992) 3 Cal.4th 1088, 1105), the relative advantages or disadvantages of the different types of trials (*People v. Castaneda* (1975) 52 Cal.App.3d 334, 344; *People v. Acosta* (1971) 18 Cal.App.3d 895, 902), or that a jury trial requires a unanimous verdict of 12 impartial persons (*People v. Tijerina* (1969) 1 Cal.3d 41, 45-46; accord, *Sivongxxay*, *supra*, 3 Cal.5th at pp. 168-170.) On this record, there is nothing to suggest that defendant was confused as to his right to a jury trial or that he did not knowingly and intelligently waive that right. There is no indication that counsel failed to advise defendant of the basic mechanics of a jury trial, the fundamental differences between a jury trial and a bench trial, or the consequences of waiving a jury trial and consenting to a bench trial. In the absence of evidence supporting a contrary conclusion, we presume that counsel acted competently in advising defendant regarding the waiver of his right to a jury trial.

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8 The probation report notes that defendant has an interest in political science and "pre-law." A letter written by defendant in connection with sentencing indicates that he was a political science major prior to the incident with I.S. When defendant's uncle spoke at sentencing, he noted that defendant wanted to be an attorney when he transferred to UC Davis.

Defendant has not cited, and we have not found, any controlling authority demonstrating that his jury trial waiver was inadequate under the circumstances presented here. (See *People v. Doyle* (2016) 19 Cal.App.5th 946, 953 [finding jury trial waiver to be knowing and intelligent, even though the trial court failed to advise defendant that he was entitled to a unanimous verdict by 12 jurors, where "defendant's counsel advised the trial court she had discussed defendant's waiver of a jury trial with him on two occasions" and there was "nothing in the record to support that defendant was confused as to the right to a jury trial or that he did not knowingly waive that right"].)[9]

Defendant's reliance on *People v. Jones* (2018) 26 Cal.App.5th 420 is misplaced. In that case, the defendant's convictions were reversed and the matter was remanded for a new trial because the "sparse record" did not affirmatively show that she provided a knowing, intelligent, and voluntary waiver of her right to a jury trial. (*Id*. at pp. 423, 435-437.) The waiver inquiry in *Jones* was limited to the prosecutor asking the defendant if she understood her right to a jury trial, and whether she agreed to waive that right and have the trial judge, "sitting alone, decide the case." (*Id*. at pp. 428, 435.) Although the record showed that the defendant had some discussion with her attorney before the waiver was taken in that it was her attorney who indicated to the trial court that she wanted to waive her right to a jury trial, the record did not show whether the attorney ever discussed with her the nature of a jury trial, and the trial court did not specifically advise her that she had a right to a jury trial or take steps to ensure that she understood what the jury right entails. (*Id*. at pp. 435-436.) The appellate court concluded that the defendant's "bare acknowledgment that she understood her right to a jury trial was

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9 The Supreme Court granted review in *Doyle*, which was held for *Sivongxxay*. After *Sivongxxay* issued, the court dismissed its grant of review and remanded the matter. (*People v. Doyle*, *supra*, 19 Cal.App.5th 946, review granted Feb. 15, 2017, S238666, review dismissed and cause remanded Jan. 31, 2018.)

inadequate." (*Id*. at p. 436.) The court explained that the record did not show that the defendant understood the nature of the right being abandoned and the consequences of the decision to abandon it, as she was advised only that the trial judge would decide whether she was guilty or innocent. The trial court did not advise the defendant as to the specific rights she would be giving up or inquire if her attorney had explained those rights to her. Further, there was no indication that the defendant had any prior experience with the criminal justice system. (*Id*. at pp. 436-437.)

We find *Jones* to be factually distinguishable. The record in this case is more developed than *Jones* and affirmatively shows that defendant provided a knowing and intelligent waiver of his right to a jury trial.

DISPOSITION

Defendant's conviction for sexual penetration of the genital or anal opening of a person under 18 years of age by a foreign object in count 3 is reversed. The trial court is directed to prepare an amended abstract of judgment that deletes any reference to count 3 and reflects that defendant's sentence has been reduced to three years. The trial court shall forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

BUTZ, J.

We concur:

RAYE, P. J.

MAURO, J.